Florida Tile Company *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Case 10–CA–24224

November 21, 1990

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On January 22, 1990, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to modify the remedy,[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Florida Tile Company, Shannon, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951) We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that Benjamin J. Deleski's discharge violated Sec. 8(a)(3) of the Act, we note that the judge found discriminatory motivation in part based on the evidence that the discharge occurred the day *after* the Union engaged in handbilling at the Respondent's premises. We are satisfied that, in drawing this inference, the judge implicitly discredited testimony by the Respondent's officials that the discharge decision occurred on the day *before* the handbilling but was not implemented until 2 days later. Although the judge also relied on evidence that the Respondent failed to follow its progressive disciplinary system in discharging Deleski, the Respondent has argued that the circumstances giving rise to Deleski's discharge were comparable to the other instance in which it allegedly fired an employee without adhering to its extensive system of conferences and written warnings. We reject this argument because the record shows that the prior incident concerned an employee who the Respondent, on opening the plant involved here, quickly discharged for poor attitude and lack of cooperation.

[3] Backpay will be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

Mary Bulls, Esq., for the General Counsel.
John Breckenridge, Esq., of Tampa, Florida, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on November 16, 1989, at Rome, Georgia. The hearing was held pursuant to a complaint issued by the Acting Regional Director for Region 10 of the National Labor Relations Board (the Board). The complaint is based on an amended charge filed on July 12, 1989, by International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (the Charging Party or the Union), on July 3, 1989. The complaint alleges that Florida Tile Company (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging and failing and refusing to reinstate its employee Benjamin J. Deleski because of his engagement in concerted activities and also violated Section 8(a)(1) of the Act by unlawfully interrogating its employees and by restricting Deleski from a portion of the plant while the Union was engaged in an organizational campaign. Respondent by its answer of August 25, 1989, has denied the commission of any violations of the Act.

Upon the entire record in this proceeding, including my observations of the witnesses who testified herein, and after due consideration of the briefs filed by the General Counsel and counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

A. *The Business of Respondent*

The complaint alleges, Respondent admits, and I find, that the Respondent was, and has been at all times material herein, a Florida corporation with an office and place of business located at Shannon, Georgia, where it is engaged in the manufacture of floor tile; that during the calendar year preceding the filing of the complaint, a representative period of all times material herein, it sold and shipped from its Shannon, Georgia facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia, and that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

B. *The Labor Organization*

The complaint alleges, Respondent admits, and I find that the Charging Party Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

In April 1989, the Union commenced an organizing campaign at Respondent's plant in Shannon, Georgia. Benjamin J. Deleski, the alleged discriminatee herein, testified that he initiated the campaign by calling the Union's office and that they gave him authorization cards to be signed by interested employees whereupon he and other employees solicited signatures of their fellow employees at the plant. During the period from April to June 8 when Deleski was discharged by Respondent, he carried the cards in his shirt pocket and openly solicited his fellow employees in the breakroom.

Deleski was hired by Respondent in January 1987 as a palletizer and was promoted to assistant audit laboratory technician 1-1/2 years later. The Respondent operates shifts 7 days a week. The shifts normally consist of four 10-hour days. Deleski was employed on the C shift where he worked from 6:30 p.m. to 4:30 a.m., 4 days per week. In the spring of 1989, Deleski had received no disciplinary action with the

exception of a single warning for attendance on his record which had been issued in June 1988. Respondent uses a system of ''conferences'' wherein its supervisors have a conference with an employee for a number of offenses such as absenteeism, tardiness, production, and attitude. These conferences are sometimes oral and sometimes in writing and given to the employee which he is asked to sign and are documented in writing by the supervisor whether they are oral or written. If an employee receives three conferences, he is given a written warning which is placed in his file. If an employee receives three warnings in a year's period, he is discharged. There are a number of offenses for which an employee may be issued three warnings prior to his discharge such as work performance and attitude and this procedure is normally followed by Respondent prior to discharging its employees.

In May 1989, Quality Control Supervisor Annett Cross issued Deleski a conference for failing to stop several boxes of defective tile in his position as a quality control inspector. Cross testified that Deleski became upset with her when she issued him the conference, slammed it down on a table refusing to sign it as requested, and left the room slamming the door. Cross had only since May 1 become the supervisor of the quality control inspectors when she was transferred from her position of production supervisor. As Cross worked the day shift and Deleski worked the night shift with another employee, Deleski worked without direct supervision although Production Supervisor Dante Flujello was in charge of the production employees on the night shift. Cross also testified that the night shift of quality control inspectors was short-handed and it had been necessary to require Deleski and a day-shift employee to work five 10-hour shifts to cover for the employee shortage but that management had told these two employees that they would not be required to work the overtime after mid-May. A new employee had been hired to train for the position of inspector but the training consisted of a 5-week training course and the new employee had been in training for only 2 weeks. Cross testified that she was asked by Deleski to bring the new employee on line to the night shift in order that Deleski could return to his normally assigned work hours and that Deleski told her the new employee could hold onto his belt loop indicating he would monitor him closely and assist him. With this assurance, she brought the new employee on line to the night shift with Deleski and permitted Deleski to return to his normal hours. Cross testified, however, that she received reports from night shift supervisors and from the employee that the employee was slowing production as he was unsure of himself and that Deleski was not providing any assistance to him. Cross testified she reported the incident concerning Deleski's reaction to the conference she gave him and concerning Deleski's failure to assist the new employee assigned to the shift as he had promised to do to Assistant Plant Manager Al Sucre. Sucre was aware of this by May 15, 1989. However, Sucre testified he took no action on this until June 6, 1989, when he asked to see Plant Manager John Smith at which time he recommended the termination of Deleski because of his uncooperative attitude and that Respondent bypass its normal progressive discipline system of giving three warnings to an employee in a 12-month period before discipline is imposed as he did not believe that the warnings would be effective in improving Deleski's attitude. Sucre testified that he had previously observed Deleski's uncooperative attitude and Plant Manager Smith testified that he also had personally observed Deleski's uncooperative attitude and agreed with Sucre's recommendation that Deleski be discharged. Smith testified that he then called in Administrative Manager Frank Shropshire who also serves as personnel manager and that they reviewed the case with Shropshire who urged that Deleski not be discharged as this was not in accordance with Respondent's policy of issuing three warnings to an employee before discharging him. The meeting occurred on Tuesday, June 6, 1989, after the start of the shift to which Deleski was assigned. Sucre testified that he did not impose the discharge on June 6, 1989, as it would have interrupted the shift and that Deleski was off the next day, Wednesday, and that he therefore waited until Deleski reported on Thursday, June 8, 1989, at the start of the shift to impose the discipline. According to Deleski, Sucre called him into his office and told Deleski he was being discharged as he did not fit into Respondent's plans and Sucre merely repeated this statement when Deleski inquired as to the reason for the discharge. Supervisor Cross testified she had not recommended to Sucre that any discipline be taken against Deleski and had no role in the discharge. Sucre testified that Cross was a weak supervisor and this is why he had personally taken the lead in recommending the discharge and imposing it. He also testified that on at least one other occasion, Respondent discharged an employee for an uncooperative attitude prior to the issuance of three warnings to him. Plant Manager Smith and Sucre testified that they only initially learned of Deleski's involvement with the Union after the meeting of June 6 but prior to their imposition of the discharge on June 8 from Shropshire who learned of Deleski's involvement from another employee on the evening of June 7 but that this did not change their decision.

Deleski testified to an occasion when another employee, Gary Smith, asked him in early May in the presence of second shift Production Supervisor Dante Flujello where the union meeting was that evening. Smith corroborated this testimony which was unrebutted by Flujello. Smith testified further that near the end of May, Flujello asked Smith how many cards (union) they had and what kind of support the Union had. This testimony was also unrebutted by Flujello. Smith had not been a known union advocate.

Deleski also testified that in mid-May, Flujello told him not to walk alongside the paint spraying booths and talk to the employees as the union business was going on. Deleski had not been previously so restricted. Flujello testified he is not sure whether or not he made these comments as the union campaign was common knowledge, but that he was merely attempting to keep Deleski from interfering with the work of the employees assigned to the spray painting. Respondent demonstrated also that there was no work reason for Deleski to walk alongside the employees engaged in spray painting. Deleski also testified that at his request the Union handbilled Respondent's employees on June 7, 1989.

Respondent also produced evidence through the testimony of Plant Manager John Smith that during 1988 and 1989, the Union conducted two organizational campaigns on the premises and that Respondent was aware of a number of employees who identified themselves as union supporters but that no actions were taken against them. Smith further testified he told the employees in the a meeting in 1988 that the Re-

spondent was opposed to the Union but that they were free to support the Union and there would not, and could not, be any retaliation against them for doing so and that the employees were allowed to and openly did campaign in the Respondent's lunchroom during lunch.

Analysis

I find that the General Counsel has proven a violation of Section 8(a)(1) of the Act as the questioning by Flujello of Smith constituted unlawful interrogation. *Rossmore House*, 269 NLRB 1177 (1984). I further find the evidence supports a finding that the Respondent discriminated against Deleski by limiting him to his work area as I find that the restriction of Deleski by Flujello was a change from the previous unrestricted movement in the plant previously enjoyed by Deleski and was motivated by Supervisor Flujello's efforts to restrict Deleski's support of the Union. See *Inductive Components*, 271 NLRB 1448, 1471 (1984); *Hall of Mississippi*, 249 NLRB 775, 779 (1980). I thus find that Respondent violated Section 8(a)(1) of the Act by the interrogation of employee Gary Smith by Supervisor Flujello and by the restriction imposed on Deleski by Flujello.

I further find that the General Counsel has demonstrated that the Respondent had knowledge of Deleski's role as a union supporter in the second campaign as well as in the prior campaign. Whether or not Respondent's management officials were aware of Deleski's initial contact made to the Union to commence a second union campaign in 1989, they were aware that he was involved with it by reason of his open solicitation of union cards in the breakroom, the comments of employee Gary Smith to Deleski in the presence of Flujello concerning the union meeting, Flujello's direction to Deleski to stay off the spray line because of the union talk, and ultimately Shropshire's knowledge of Deleski's participation in the union campaign the night before his discharge. I further find that the circumstances giving rise to Deleski's discharge are suspect. Thus, Respondent chose to discharge an employee who had only a single warning for attendance currently in his file although admittedly its own policies require the issuance of three warnings for attitude or lack of cooperation problems before the employee is to be discharged. Additionally, the timing of the discharge the next day after the Union handbilled the Respondent's premises gives rise to an inference that the discharge was discriminatorily motivated. I also find the absence of a recommendation by Supervisor Cross that Deleski be disciplined, much less discharged to be noteworthy. I further find that the method of discharging Deleski without warning for no specified reason except that he did not fit into the Respondent's plans and the refusal of Assistant Plant Manager Sucre to discuss the reasons with Deleski give rise to a finding that the discharge was discriminatorily motivated. I thus find that the General Counsel has made a prima facie case that the discharge of Deleski by Respondent was motivated in part by the Respondent's disdain for Deleski's role as a union supporter. I also find, based on the foregoing and after considering the testimony of Respondent's witnesses, that Respondent has failed to rebut the prima facie case by the preponderance of the evidence and has failed to persuasively demonstrate that it would have discharged Deleski in the absence of his protected activities as a union supporter. I thus find that Respondent violated Section 8(a)(3) and (1) of the Act by its discharge of Deleski. *Roure Bertran DuPont, Inc*., 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

Conclusions of Law

1. The Respondent, Florida Tile Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by the interrogation of its employee concerning the union campaign.

4. Respondent violated Section 8(a)(1) of the Act by requiring Deleski to stay out of the spray paint area.

5. Respondent violated Section 8(a)(3) and (1) of the Act by its discharge of Benjamin Deleski.

6. The above unfair labor practices have the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, it shall be ordered to cease and desist therefrom, and to take certain affirmative action, including the posting of an appropriate notice, designed to effectuate the purposes of the Act. It shall also be ordered to rescind its discharge of Benjamin J. Deleski, offer him full reinstatement to his former position or, if his former position no longer exists, to a substantially equivalent position, expunge its files of any reference to the unlawful discharge and advise him in writing that said unlawful discharge will not be used in any adverse manner against him in the future and it shall also be ordered to make Deleski whole for any loss of wages or benefits sustained by him since June 8, 1989, with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[1] Respondent shall also be ordered to restore to Deleski all seniority rights and privileges up to and since the date of his unlawful discharge.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Florida Tile Company, Shannon, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities or restricting its employees' movements in the plant because of their union activities.

(b) Discharging its employees because of their engagement in protected concerted activities on behalf of the Union.

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[1] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp*., 231 NLRB 651 (1977).

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its unlawful discharge of employee Benjamin J. Deleski, offer him full reinstatement to his former position or to a substantially equivalent position, if his former position no longer exists, and make him whole for all loss of earnings and benefits sustained by him with interest and full restoration of all seniority rights and privileges as set out in the remedy.

(b) Remove from its files any reference to the unlawful discharge and notify Benjamin J. Deleski in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Shannon, Georgia, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you concerning your union membership, activities, or desires.

WE WILL NOT restrict you in your movements in the plant because of your support of the Union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Benjamin J. Deleski immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Benjamin J. Deleski, in writing, that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

FLORIDA TILE COMPANY